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No. ____

In The

Supreme Court of the United States

October Term, 1995

STATE OF IDAHO,

Petitioner,

vs.

STEVEN GAFFORD,

Respondent.

Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether *Foucha v. Louisiana* applies retroactively on collateral review to compel the release of a dangerous offender who was acquitted by reason of insanity and against whom equitable bars might otherwise operate.

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PETITON FOR WRIT OF CERTIORARI

The State of Idaho petitions for a writ of certiorari to review the decision of the Supreme Court of Idaho which, acting pursuant to *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780 (1992), ordered Respondent's release from a state hospital. The decision of the Idaho Supreme Court retroactively applies *Foucha v. Louisiana* to state collateral proceedings and finds, implicitly, that equitable bars may not preclude relief granted pursuant to *Foucha*.

OPINION BELOW

The opinion of the Idaho Supreme Court is reported as *Application of Gafford; Gafford v. State*, 903 P.2d 61 (Idaho 1995), *rehrg. denied* (1995), a copy of the opinions reproduced as an appendix to this petition.

JURISDICTION

The opinion of the Supreme Court of Idaho was filed August 6, 1995. The State's petition for rehearing was denied October 17, 1995.

The State of Idaho invokes the jurisdiction conferred on this Court by 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISION

Idaho Code § 66-337(b): The commitment of an involuntary patient shall be terminated if the patient is no longer

mentally ill or is no longer likely to injure himself or others or is no longer gravely disabled; provided, that patients admitted under section 18-214, Idaho Code, acquitted of criminal charges filed prior to July 1, 1982, on grounds of mental disease or defect, or committed pursuant to sections 18-212(3) and 66-329, Idaho Code, as unfit to proceed, may not be released from an inpatient facility unless thirty (30) days before such release, the department director or his designee shall notify the committing court and prosecuting attorney of the contemplated release.

Idaho Code § 66-337(c): Upon notification of intention to release from an inpatient facility either a patient admitted under section 18-214, Idaho Code, acquitted of criminal charges filed prior to July 1, 1982, on grounds of mental disease or defect, or committed pursuant to sections 18-212(3) and 66-329, Idaho Code, as unfit to proceed, and upon motion of an interested party or the court on its own motion, the court shall determine whether the conditions justifying such release exist. In making such determination, the court may order an independent examination of the patient. The cost of such independent examination must be borne by the party making the motion or, if indigent, the county having jurisdiction of the case. If no motion is made, the patient may be released according to the notice.

Idaho Code § 66-337(d): Section 18-214, Idaho Code, shall remain in full force and effect for every individual previously acquitted pursuant to section 18-213, Idaho Code. Section 18-214, Idaho Code, as last amended by section 2,

chapter 13, laws of 1977, which is placed here for reference only and is not a reenactment of section 18-214, Idaho Code, and reads as follows:

> 18-214. Commitment of acquitted defendant – conditional release – revocation of release within five years. – (1) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the court shall order him to be committed to the custody of the director of the department of health and welfare to be placed in an appropriate institution for custody, care and treatment.
>
> (2) If the director of the department of health and welfare is of the view that a person committed to his custody, pursuant to paragraph (1) of this section, may be discharged or released on condition without danger to himself or to others, he shall make application for the discharge or release of such person in a report to the court by which such person was committed and shall transmit a copy of such application and report to the prosecuting attorney of the county for which the defendant was committed. The court shall thereupon appoint at least two (2) qualified psychiatrists to examine such person and to report within sixty (60) days, or such longer period as the court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate such examination and the proceedings thereon, the court may cause such person to be confined in any institution located near the place where the court sits, which may hereafter be designated by the director of the department of health and welfare as suitable for the temporary detention of irresponsible persons.

(3) If the court is satisfied by the report filed pursuant to paragraph (2) of this section and such testimony of the reporting psychiatrists as the court deems necessary that the committed person may be discharged or released on condition without danger to himself or others, the court shall order his discharge or his release on such conditions as the court determines to be necessary. If the court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released. According to the determination of the court upon the hearing, the committed person shall thereupon be discharged or released on such conditions as the court determines to be necessary, or shall be recommitted to the custody of the director of the department of health and welfare, subject to discharge or release only in accordance with the procedure prescribed above for a first hearing.

* * *

(5) A committed person may make application for his discharge or release to the court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the director of the department of health and welfare. However, no such application by a committed person need be considered until he has been confined for a period of not less than six (6) months from the date of the order of commitment and if the determination of the court be adverse to the application, such

> person shall not be permitted to file a further application until one (1) year has elapsed from the date of any preceding hearing on an application for his release or discharge.
>
> * * *

STATEMENT OF THE CASE

Procedural and Factual Background

Steven Gafford, when this litigation arose, was in the custody of the Idaho Department of Health and Welfare as one acquitted by reason of insanity of charges of rape and kidnapping.[1] He was committed in 1981 under the provisions of former Idaho Code § 18-214. Since 1966, Gafford has committed a long series of major criminal acts, each resulting in an acquittal on insanity grounds.

Following the decision of the Court in *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780 (1992), and in reliance upon it, Gafford filed a petition in an Idaho magistrate court seeking discharge on a writ of habeas corpus. He alleged that he was no longer mentally ill and was therefore entitled to release from state custody. A risk assessment prepared by the staff of Idaho State Hospital South describes Gafford as follows:

> The patient has a substantial criminal and psychiatric history. Since 1966, his criminal history includes an attempted murder, the taking of a

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[1] Gafford has been released in accordance with the decision below but could be recommitted if the judgment of the Idaho Supreme Court were vacated. *See State v. Hightower*, 101 Idaho 749, 620 P.2d 783 (1980).

> hostage while in the commission of a robbery, and two incidents of kidnapping (hostage situations) with rape of the victims. Over this same time period, the patient has a history of multiple admissions to State Hospital North, State Hospital South, Idaho Security Medical Facility and a variety of VA inpatient facilities. The patient has eloped from these facilities approximately the same number of times as his admissions.
>
> * * *
>
> [H]is mental status assessment supporting psychosis was typically based on the patient's description of his prior experience and not observable symptoms of psychosis presented during the mental status interview. Many examiners have noted an affective disturbance quality to his presented psychopathology. Psychological testing throughout this period has demonstrated personality disturbance traits but has not confirmed the presence of a psychotic process. The patient concedes he has, at times, malingered and exaggerated his symptomatology. . . . (R., pp. 27; 28.)

A hearing was held on the allegations of the petition. Dr. David Ranks, a psychologist at Idaho State Hospital South, testified that although Gafford had described symptoms of mental illness in the past it was his opinion that Gafford suffered only from an antisocial personality disorder and that this condition was substantially unchanged over the relevant period of time.

Dr. Linda Hatzenbuehler, a psychologist who was called as a witness by Gafford, testified that she had diagnosed an antisocial personality. Respecting the previous inconsistent diagnoses that had led to Gafford's

several acquittals on insanity grounds, Dr. Hatzenbuehler stated that it was possible for the diseases diagnosed to go into remission but she offered no judgment about whether that had actually occurred in Gafford's case.

How The Federal Question Was Raised In The State Courts

The State opposed Gafford's release, arguing that *Foucha v. Louisiana, supra,* was not applicable retroactively, that the trial court's original finding that Gafford suffered from a mental disease or defect under former Idaho Code § 18-207 had been procured by a fraud on the court, which was an equitable reason to hold that Gafford was estopped to assert that he was not mentally ill (his diagnosis being essentially unchanged), that Gafford was otherwise estopped to claim that he was no longer mentally ill, and that a state acquiescence and waiver doctrine should be applied to deny relief.

The magistrate who gave initial consideration to Gafford's petition concluded that *Foucha* required Gafford's release from custody, irrespective of his dangerousness, because he was not mentally ill. The magistrate held also that the state's retroactivity, estoppel and acquiescence/waiver arguments had no "legal application" to the case, although no effort was made to distinguish any of the authority submitted by the state. The State appealed the magistrate's decision to the district court.

The state district court reversed the magistrate's judgment. The District Judge, the Hon. James C. Herndon, concluded that although *Foucha* affected the constitutionality of the release provisions of Idaho Code

§ 66-337(d), *Foucha* was not applicable retroactively. Judge Herndon held also that Gafford was estopped from seeking relief on the theory that the statute pursuant to which he had derived the benefit of an acquittal was unconstitutional and that Gafford's acquiescence in the use of an insanity defense constituted a waiver of later constitutional challenges to the statute. Finally, the district judge held that even if *Foucha* were applied the State had sustained the burden of proving that Gafford was both mentally ill and dangerous.

Gafford appealed to the Idaho Supreme Court, which reversed. The court held that under *Foucha* the release provisions of Idaho Code § 66-337(d), which required Gafford to show that he was no longer dangerous, whatever his continuing mental state, were unconstitutional. It also held that it was not applying *Foucha* retroactively because "Gafford does not seek to have the holding in *Foucha* applied retroactively; he seeks the prospective application of that rule to his present and continued confinement." App., pp. 6-7. Alternatively, the Idaho Supreme Court concluded that *Foucha* was retroactively applicable on collateral review because it was "formulated to protect a fundamental liberty interest." App., p. 7.

The Idaho court held that it was compelled by *Foucha* to order Gafford's release, which necessarily comprises a conclusion that equitable bars may not be raised against retroactive application of *Foucha* in collateral proceedings.

SUMMARY OF ARGUMENT

1. *Foucha v. Louisiana*, 504 U.S. 71 (1992), held that a person acquitted on grounds of mental illness could not be held after the mental illness had abated, even though the offender continued to be dangerous. The Idaho Supreme Court's holding that this principle is retroactively applicable to final judgments brought up on collateral review is not compelled by this Court's decision in *Foucha*. Such retroactive application has serious adverse consequences for the finality of judgments. *Foucha* does not announce a rule that is so fundamental that it must be considered implicit in the concept of ordered liberty. To the contrary, *Foucha* has nothing to do with the accuracy of the determination of adjudicative facts.

2. In addition to the question of retroactivity, *Foucha* raises an important question about the applicability of equitable bars designed to prevent a litigant from defrauding the courts. Gafford's original diagnoses of mental illness were the probable result of feigned illness. Equitably, Gafford should be estopped to claim that his true diagnosis of antisocial personality disorder is not a mental illness for the purpose of applying the *Foucha* rule. The Idaho Supreme Court's refusal to consider principles of equity in the application of *Foucha* to previously final cases should be addressed by this Court and the Court should hold that *Foucha* does not prohibit the enforcement of principles of equity.

3. The holding of the Idaho Supreme Court is inconsistent with the holdings of this Court and with the holdings of other state courts of last resort. In other states, it is permissible to continue to hold a dangerous offender who

has a diagnosis of antisocial personality disorder because statutory terms relating to mental disease or defect are broader than the medical concept of mental illness. Accordingly, an offender like Gafford, whose condition has not changed since his acquittal, should not be covered by the *Foucha* principle.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

Foucha v. Louisiana Should Not Require The Release Of Persons Acquitted By Reason Of Insanity When Retroactive Claims For Release Are Made Collaterally

This case presents an important question concerning the applicability of *Foucha v. Louisiana, supra,* to persons acquitted by reason of mental illness whose cases were final prior to the decision in *Foucha*. The decision below arose from a state petition for a writ of habeas corpus and resulted in retroactive application of *Foucha,* notwithstanding equitable reasons for a different outcome.

The State of Idaho seeks review because retroactive application of new rules of constitutional interpretation has significant potential to undo the finality of judgments. The question is one of general importance.[2] Herein, the State argues that the Idaho Supreme Court's decision declining to apply equitable principles of estoppel, acquiescence and waiver was factually and legally

[2] Idaho has repealed the insanity defense, Idaho Code § 18-207, and *Foucha* will directly affect only a limited number of Idaho cases.

incorrect. The State argues also that the Idaho Supreme Court has retroactively applied *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992) and that its decision is legally erroneous as a matter of federal constitutional law. With respect to each of these points, the State asserts that the Idaho Supreme Court is incorrect in the assumption it makes that its decision is required by *Foucha*.

Retroactive Application

The Idaho Supreme Court held that *Foucha* was not being applied retroactively in Gafford's case and that even if it were it would be proper to do so because *Foucha* announced a principle implicit in the concept of ordered liberty. (Citing *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 1060 (1989).) Both of these conclusions are contrary to decisions of this Court.

The argument that the *Foucha* rule was not applied retroactively in Gafford's case because he did not seek to disturb the original judgment of acquittal overlooks several important factors. For one thing, the original judgment was not the basis for relief. It was the decision in *Foucha* upon which Gafford had to rely and it is inescapable that it was applied retroactively because without it the law in effect at the time of Gafford's acquittal would still be in effect. Gafford would not be entitled to release under the law prior to *Foucha*.

For the purpose of determining whether a rule announced subsequent to a prior judgment will be applied retroactively, the applicability of the new rule to existing circumstances is the focus of analysis. The Idaho Supreme Court's conclusion that a new rule is not being

applied retroactively unless it directly attacks the judgment on which the defendant is incarcerated suggests that no judgment need be considered final if it can be undone by a new rule which changes the statutory consequences of a judgment without finding the judgment itself to be invalid. In this case the state court held that the judgment is still valid but the consequences of the judgment are not. This approach overlooks the circumstance that the judgment and its consequences are inseparable. It is fundamental that the retroactivity question has to do with "the effect of the subsequent ruling on prior final judgments when collaterally attacked. . . ." *Linkletter v. Walker*, 381 U.S. 618, 627-629 (1965). See also: *Tehan v. United States ex rel. Shott*, 383 U.S. 406 (1966) (whether a new principle will be applied retroactively will depend in part on the effect of such application of the new rule on the administration of justice); *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720-1721 (1993) (discussing the point that the interest in finality greatly limits the chance for retroactive application on collateral review). This Idaho Supreme Court's application of *Foucha* is not consistent with the jurisprudence governing questions of retroactivity and would result in an application of *Foucha* most likely not intended by this Court.

A new rule which is so fundamental that it is considered to be implicit in the concept of ordered liberty, and for that reason retroactive, is generally defined as one of a very narrow class. *Graham v. Collins*, 113 S. Ct. 892, 903 (1993) ("small core of rules requiring observance of those procedures that are 'implicit in the concept of ordered liberty.' ") In *Butler v. McKellar*, 494 U.S. 407, 415 (1990), the Court explained that rules "implicit in the concept of

ordered liberty" are those that enhance the accuracy of the determination of guilt and retroactivity is *limited* "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Id. Cf., Goeke v. Branch,* 115 S. Ct. 1275 (1995) (rule denying right of appeal to fugitive "is not among the 'small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.' " 115 S. Ct. at 1278).

It is clear that the rule which led to Gafford's continued confinement has nothing to do with the accuracy of the judgment. In fact, the opposite is true. Retroactive application of *Foucha* lends to inequity rather than accuracy. It would be an absurdum to suggest that the concept of ordered liberty includes a command to honor a right to deception or inaccurate resolution of facts. The purpose of rules against retroactive application is to validate "reasonable, good-faith interpretations of existing precedents made by state courts even if they are shown to be contrary to later decisions." *Butler v. McKellar, supra,* 494 U.S. at 413. The enforcement of former Idaho Code §§ 18-213, 214 and Idaho Code § 66-337(d), pursuant to which Gafford was committed until he could show that he is no longer dangerous, was such a reasonable reliance on existing law. See *Jones v. United States,* 463 U.S. 354 (1983) (insanity acquitee may be held for longer term than he could have received on a conviction).[3] That continued to

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[3] The separate question whether the state may extend confinement beyond the maximum term Gafford could have received had he been convicted is, in the state's view, not raised here. Gafford, had he been convicted of rape or kidnap, could

be the case until the time *Foucha* was decided. The Idaho Supreme Court's conclusion that the *Foucha* rule is a fundamental and primary assurance of accuracy in the finding of guilt is not consistent with existing principles of constitutional law.

Foucha was not decided on the theory that the rule announced was necessary to assure that guilt would be accurately determined. It certainly does not demand the conclusion that the inequitable conduct of the defendant will preclude retroactive application. To argue that the defendant's inequitable conduct is a right implicit in the concept of ordered liberty is inherently contradictory. It cannot logically be part of the concept of ordered liberty to allow one to first escape a conviction on the ground of "insanity" and then to escape punishment on the ground that the insanity was not real. That, however, is the result upon which Gafford predicated his claim. In the State's view, the Idaho courts were entitled to give serious consideration to the equitable bars discussed herein before granting Gafford retroactive relief under *Foucha*.

Estoppel

It cannot reasonably be disputed that the Idaho Supreme Court's decision in this case, if it is allowed to stand, risks grave consequences for the safety of the public. Gafford is a violent offender who has been guilty of kidnapping, rape, robbery with hostage-taking, and attempted murder. He was once apprehended and

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have been confined for life. Idaho Code §§ 18-6104; 18-4502; 18-4504(1).

detained by the Secret Service as a threat to the safety of the President of the United States. He has been violently assaultive toward other residents of State Hospital South. On the basis of Gafford's history of violent behavior and his character traits, Dr. David Ranks of State Hospital South testified that if released Gafford would pose a serious threat to the public. "His past history indicates that if he should become angry, then he may opportunistically and impulsively select a victim and commit a rape and set up a hostage situation which represents a risk to the hostage and may also represent a risk to Mr. Gafford's own safety." Tr., p. 32, Ls. 3-7. Notwithstanding this risk, the Idaho Supreme Court's decision compels Gafford's release even though, in the State's view, the Constitution does not require such a result.

The court held that Gafford's mental status had changed after his acquittal and commitment and that he was eligible for release under *Foucha v. Louisiana* because he was no longer mentally ill. In this aspect of its holding, the Idaho Supreme Court took an unusual view of mental illness. The evidence that Gafford was *never* mentally ill, from a medical viewpoint, was *undisputed*. Moreover, neither the magistrate nor the district court found that Gafford once suffered from a mental illness from which he had recovered. That which *has* changed is *Gafford's* view that an antisocial personality diagnosis is tantamount to a diagnosis of mental illness. A synopsis of the evidence placed before the magistrate may be helpful. It shows that the State produced testimony that Gafford had faked mental illness, that he still suffered from an antisocial personality disorder, just as he had at the time of his insanity acquittal, and that he would continue to be a

danger to the public. Gafford, in response, concentrated on showing that he was not *presently* mentally ill, a position which simply assumed that the previous acquittals accurately reflected specific facts about his mental status, that is, that he was once mentally ill. This position, of course, ignored the state's evidence that Gafford's present mental condition was the same as it had always been.[4]

Although it seems to be argued by the Idaho Supreme Court that the prior judgment established "mental illness," the argument begs the point. The judgment of acquittal did not represent a specific fact finding that Gafford's mental illness was established by a particular diagnosis. It seems clear that an antisocial personality disorder, which is not generally considered a mental illness, was the only basis for the finding of mental disease or defect. If one is to credit the 1981 finding of mental illness, it must now be said that since Gafford's mental status has not genuinely changed he is mentally ill if he was mentally ill in 1981 and *Foucha* is of no assistance to him. The present inquiry is into whether the defendant's status has *changed*, which makes the *Foucha* inquiry inseparable from the question of Gafford's present mental status.

Dr. Ranks, in conformity with the settled medical position that an antisocial personality disorder is not "mental illness," testified that Gafford was not presently

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[4] Other state courts have taken the position that *Foucha* does not govern cases where the statutory definition of the relevant mental condition is broader than the medical meaning of "mental illness." *See* Part II, *infra*.

mentally ill nor had he been mentally ill in the past beyond the antisocial personality diagnosis which persists to the present time:

> DR. RANKS: . . . I have completed a review of every piece of paper in all of Mr. Gafford's very extensive medical records and based upon that complete review and Mr. Gafford has had psychological testing many times during that period of time which have been consistent in showing a personality disorder but had been remarkable for the total absence of any indications of mental illness and that coincides with the mental status exams which were completed and that are consistent with the most recent psychological evaluations and mental status at this time.
>
> Based upon all of those factors, it's my opinion that he *has remained the same today as he was then, which is free of mental illness.* Tr., p. 21, Ls. 9-21. (emphasis added).

This evidence was not contradicted. Dr. Ranks explained that Gafford's consistent insanity acquittals were the result of feigned mental illness and possibly drug induced psychosis of short duration:

> DR. RANKS: [Gafford's] wife, Barbara, indicated that, in fact, when he was held to be not guilty by reason of insanity he had not been mentally ill. I had a discussion about that with Mr. Gafford on the 11th of August of 1992 and also on the 4th of August, 1992. On the 4th of August Mr. Gafford stated to me that at times he created an impression of mental illness to avoid jail and legal problems and agreed that his

periods of problems have, in fact, been when he was consuming alcohol.

* * *

[Upon Gafford's discharge from a VA hospital, a psychiatrist, Dr. Olivia, evaluated Gafford] Dr. Olivia indicated, and I quote ' . . . the most noteworthy aspect of this patient's illness is that his wife has revealed that this patient is a great con artist. She states that he has time and again committed unlawful acts and escaped the consequences by simulating mental illness and fleeing into various VA and other psychiatric facilities. . . . '

. . .

My overall review of the records, in light of the knowledge of both his tendency to claim mental illness when it was not present and differentiating the characteristics of paranoid schizophrenia from those of a brief psychotic state related to amphetamines and alcohol, is that his pattern fits well with the pattern of amphetamines and alcohol and has not been found to fit well with the picture of paranoid schizophrenia. Throughout the same period of time as I've mentioned, psychological testing on him has failed to ever show evidence of psychosis but has consistently documented the presence of a personality disorder of a type which is consistent with an antisocial personality disorder. Tr., p. 22, Ls. 4-13, p. 25, Ls. 7-13, 19-25, p. 26, Ls. 1-6.

The State's showing that Gafford has an antisocial personality disorder presently as well as at the time of his acquittal, that he had never been mentally ill, and that his mental status at the time of the habeas hearing was the

same as it was at the time of his acquittal, was unrebutted. There is no support in the record for the Idaho Supreme Court's speculative view that Gafford might simply have gotten better over the years. Gafford has repeatedly procured acquittals by faking mental illness upon being charged with crimes, an endeavor facilitated by amphetamine and alcohol abuse.

The legitimate public expectation that law abiding citizens will at least be provided with a system of adjudication calculated to isolate dangerous criminals is defeated by a decision that would institutionalize a new right to escape full accountability by manipulation of the facts. This is exactly the kind of injustice to which equitable remedies are addressed, for which reason this Court should find that *Foucha* does not prevent a state court from reading questions of estoppel, acquiescence and waiver before granting relief. Habeas corpus is "traditionally regarded as governed by equitable principles." *Kuhlman v. Wilson*, 477 U.S. 436, 447, 106 S. Ct. 2616, 2623 (1986). Thus, "in habeas, equity recognizes that 'a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.' " *McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 1468 (1991). The equitable rules discussed are not inconsistent with *Foucha* nor does anything about the opinion suggest that the Court believed them to be inapplicable.

II.

The Decision Of The Idaho Supreme Court Is Not Consistent With This Court's Cases; There Is A Division Of Authority Among Other State Courts Of Last Resort

The small number of cases that constitute the jurisprudence applying *Foucha* to claims that antisocial personality disorders are "mental illnesses" for purposes of determining whether the basis for commitment is a continuing condition reach the same result as that reached by the state district court, usually by defining "mental illness" or "defect" more broadly than the medical compass of the terms. In *People v. Parrish*, 879 P.2d 453 (Colo. 1994), the applicant for release was acquitted of criminal charges on insanity grounds because he had diagnoses of antisocial personality disorder, borderline personality disorder and "paraphilia," another personality disorder. Expert witnesses testified that these disorders were "abnormal mental conditions," but there was testimony that the conditions were not considered "mental illness." Parrish demanded his release because the personality disorders that led to his acquittal were not mental illnesses. The Colorado Supreme Court held that a mental disease or defect, including a personality disorder, is the equivalent of "mental illness" within the meaning of *Foucha*. The Colorado court pointed out that *Foucha* was not definitive on the meaning of "mental illness" because the Supreme Court had not defined it, the term was not a point of controversy in *Foucha*, and it had been accepted by the parties that Foucha was not mentally ill.

The Minnesota Supreme Court held in *In Re Blodgett*, 510 N.W.2d 910 (Minn. 1994), that a personality disorder may be the basis for a continuing commitment. Blodgett

was diagnosed as an antisocial personality and a psychopathic personality, which was defined by State law as a personality condition characterized by sexual irresponsibility and impulsivity. Blodgett argued that he was entitled to release under *Foucha* because personality disorders are not medically recognized mental illnesses. The Minnesota Supreme Court distinguished *Foucha* factually. The court held that the personality disorders with which Blodgett had been diagnosed were a proper basis for commitment and, because they were continuing, Blodgett had not established a basis for release. The case seems to imply that because the state definition of a psychopathic personality, though not a mental illness, was the ground for commitment, *Foucha* does not apply. This resolution depends not on a particular definition of mental illness but upon whether the original basis for the commitment has remained unchanged.

Similarly, the Court of Appeals for the Fifth Circuit held in *United States v. Jackson*, 19 F.3d 1003 (5th Cir. 1994), that *Foucha* did not require the release of an insanity acquittee who contended that his dangerousness was the product of his antisocial personality disorder rather than his mental illness. Jackson argued that he could only be held if his dangerousness could be linked to his mental illness, which was in remission. Although the court held that there was countervailing evidence upon which the lower court might properly have based a decision that Jackson had failed to prove that his violent tendencies were unrelated to his psychosis, it seems to have assumed that *Foucha* was not addressed to cases where the continuing mental condition, even if it is not a mental illness, is the basis for the commitment and the factor to which

the defendant's dangerousness is attributable. It would follow that if an antisocial personality was the basis of the original acquittal, detention would be authorized for as long as the defendant remains dangerous.

Foucha supports the view advanced in *Parrish*, *Blodgett*, and *Jackson* because the Court's opinion is based on the continuation of the original diagnosis, not upon a particular definition of mental illness. In the trial court, Foucha was found to be unable to distinguish right from wrong at the time of the offense, to be unable to appreciate the consequences of his acts and to be a menace to himself and others, all because of "mental disease or defect." Upon his acquittal on these grounds, Foucha was committed to a mental facility until such time as the medical staff recommended his release. Four years later, a medical commission concluded that there had been no evidence of mental illness since Foucha's commitment, but it could not certify that he would not constitute a menace to himself and others if released. There was evidence that at the time of commitment Foucha probably suffered from a drug-induced psychosis, which was only temporary. Foucha also had an antisocial personality disorder, which was only temporary.

Foucha sought his release. The Louisiana Supreme Court held that *Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043 (1983), did not require such relief and that neither the Due Process Clause nor the Equal Protection Clause was violated by a statutory provision permitting confinement of an insanity acquittee based on dangerousness alone. Importantly, Foucha's antisocial personality diagnosis was the continuing basis for detention but it was not the basis for the original commitment. Louisiana

agreed that Foucha was not mentally ill but did not argue that continued confinement could be based on the diagnosed personality disorder. It could not do so inasmuch as this was not the diagnosis upon which the acquittal had been founded.

The Court's reasoning in *Foucha* stresses certain differences in necessary proofs between civil commitments and those following insanity acquittals. Civil commitments require evidence of mental illness and the need for hospitalization for the patient's welfare and the protection of others. Civil commitments depend on proof greater than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Foucha,* 112 S. Ct. at 1783. Insanity acquittals, by contrast, may result in commitments without proof of mental illness and dangerousness because the acquittal establishes factually (1) the commission of a criminal offense and (2) that the offense was the product of mental illness *Id.; Jones v. United States, supra.* From these established facts it could be inferred that at the time of the verdict the defendant was still mentally ill and dangerous and could be committed. *Foucha,* 112 S. Ct. at 1783. The Court concluded, however, that when the basis for the commitment ceases to exist (in Foucha's case the termination of drug-induced psychosis), it is a violation of due process to continue to hold the acquitted without meeting the civil commitment burden.

The holding in *Foucha* is a judgment that a continuing basis for commitment must be shown in order to justify continued confinement because "the commitment [must] bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 1785. Apparently, the

theory is that the inference of a valid reason to hold the acquitted vanishes when the original mental state changes. The State must then either seek to establish grounds for civil commitment or release the acquittee. Louisiana's attempt to hold Foucha on the basis of his personality disorder was, in the Court's view, flawed because (1) the original basis for commitment was gone, (2) continued restraint must be related to the original basis for commitment upon acquittal, and (3) it is arbitrary to do otherwise. *Id.* at 1784-1785.

No particular substance was given to the term "mental illness" by the Court's opinion in *Foucha*, see *People v. Parrish, supra*, and the decision gives no indication that the Court intended a narrow or specific meaning. As Justice O'Connor explained in a concurring opinion:

> It might be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness. [Citations omitted]. . . . I think it clear that acquittees could not be confined as mental patients absent *some* medical justification for doing so; in such a case the necessary connection between the nature and purposes of confine would be absent. [Citations omitted]. . . . Nor would it be permissible to treat all acquittees alike, without regard for their particular crimes. For example, the strong interest in liberty of a person acquitted by reasons of insanity but later found sane might well outweigh the governmental interest in detention *where the only evidence of dangerousness is that the acquittee committed a non-violent or relatively*

> *minor crime.* 112 S. Ct. at 1789-1790. [Emphasis added]

It seems plain, accordingly, that a state which acquits on the ground that a personality disorder is a mental defect sufficient to justify an acquittal in a homicide case has tailored the detention to a pressing need for public safety when it insists that as long as the basis for acquittal continues and the patient remains dangerous the patient may be detained. Gafford's indefinite detention, moreover, does not exceed the penalty he might have received on conviction for the offense and there is no concern that his continued detention is indefinite in the sense that he may be held well beyond the term of possible criminal confinement on a showing of dangerousness alone. A final judgment establishing mental illness in a particular case is thus not assailable unless the defendant's mental condition has changed or the defendant is no longer dangerous. The state sees nothing in *Foucha* that would or should prevent a state court from giving consideration to equitable concerns. The Idaho Supreme Court, however, found no room in *Foucha* for such an analysis.

Collateral Estoppel

The state supreme court's erroneous view of the relevance of the collateral estoppel doctrine was also colored by its narrow understanding of *Foucha*. The court held that the issue litigated in response to Gafford's habeas petition was not identical to the mental status issue litigated at the time of his acquittal. The court states that:

> the judgment of acquittal determined that *at the time he committed certain criminal acts,* Gafford

> was suffering from a mental disease or defect that relieved him of criminal responsibility for those acts. . . . However, it is undisputed that Gafford's mental condition has changed since his acquittal in 1981. Gafford's mental state *in 1995*[5] *was not and could not be determined by the judgment of acquittal. Gafford v. State,* slip op., p. 6, (court's emphasis).

This conclusion overlooks the central feature of the collateral estoppel rule in relationship to Gafford's case. It is not correct that Gafford's mental condition has changed since 1981, as we pointed out above. The important fact is that Gafford misrepresented his true mental state in 1981. The collateral estoppel rule would hold him to the representation he made in 1981 – that his present mental condition (antisocial personality) was a mental illness or defect. If that is held to be the case, Gafford cannot now prevail on a claim of changed mental status. In this light, the issue presented in 1992 was the same as that offered in 1981, that is, did Gafford have only an antisocial personality in 1981? If he did, and it is uncontradicted in the record, the "issue" collaterally estopped is not defined by whether Gafford's factual representations were erroneously considered to be a mental illness. In connection with the collateral estoppel issue, the state urges that *Foucha* not preclude resort to equitable rules that would prevent Gafford from rewriting the facts to secure his release. The state sought below to make the mental illness

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[5] Gafford's mental state in 1992, when evidence was taken at the habeas hearing, is the relevant point of reference. There has been no litigation concerning Gafford's mental state in 1995, although there is no reason to think that it is any different than in 1992.

determination of 1981 be binding on Gafford. The state court's resolution of this issue, which it thought to be consistent with *Foucha*, would permit a litigant to obtain his release by an unconscionable manipulation of the facts. Equitable rules were devised to prevent such injustices and it is particularly appropriate to apply them in this case. As we argue herein, nothing about such a result is inconsistent with *Foucha* and the state submits that *Foucha* does not require Gafford's release where there are equitable bars to such a consequence.

CONCLUSION

Foucha does not require the relief granted. The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 21472

IN THE MATTER OF THE APPLICATION OF: STEVEN GAFFORD For a Writ of Habeas Corpus.	1995 Opinion No. 98 Idaho Falls May 1995 Term Filed: August 16, 1995 Frederick C. Lyon, Clerk
STEVEN GAFFORD, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bingham County, Hon. James C. Herndon, District Judge; Hon. James L. Martsch, Magistrate Judge.

Appeal from magistrate's grant of petition for writ of habeas corpus. *affirmed.*

David N. Parmenter, Blackfoot, for appellant.

Hon. Alan Lance, Idaho Attorney General; Lynn E. Thomas, Solicitor General, Boise, for respondent. Lynn E. Thomas argued.

TROUT, Justice

The petitioner, Steven Gafford, is an insanity acquittee who seeks release from commitment on the ground that he is no longer mentally ill.

I.
BACKGROUND

Gafford has a varied history of mental illness and commitment, including multiple admissions to State Hospital North, State Hospital South, the Idaho Security Medical Facility, and Veterans Administration inpatient facilities. On July 6, 1981, he was acquitted of criminal charges by reason of insanity and has since been confined at State Hospital South in Blackfoot, Idaho. However, it is undisputed that since the time of his commitment in 1981, his situation has changed and he no longer suffers from the mental condition that led to his acquittal.

In 1992, the United States Supreme Court struck down a Louisiana statute that allowed an insanity acquittee to be committed to a mental institution until he could demonstrate that he was not dangerous, even though he was no longer mentally ill. *Foucha v. Louisiana*, 504 U.S. ___, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). The Court held that such an acquittee is entitled to release, as a matter of due process, when the original basis for commitment no longer exists or the person is no longer dangerous. If the person's confinement is to be perpetuated beyond this point, that person is entitled to constitutionally adequate procedures (i.e. civil commitment procedures or criminal prosecution) to establish a valid basis for continued confinement. *Id.* at ___, 112 S.Ct. at 1784-86 (citations omitted). Relying on this decision, Gafford filed a petition for writ of habeas corpus seeking release from confinement on the ground that he is no longer mentally ill.

II.
PROCEDURAL HISTORY

The magistrate determined that I.C. § 66-337(d), which allows for the continued confinement of insanity acquittees on the basis of dangerousness alone, is unconstitutional in light of *Foucha*. Finding that the basis for Gafford's acquittal and commitment no longer exists, the magistrate held that the State could not continue to confine him based solely on his potential dangerousness.

On appeal, the district court reversed the magistrate's decision. It concluded that although I.C. § 66-337(d) is unconstitutional, *Foucha* does not apply retroactively to Gafford's case. The district court also concluded that Gafford is estopped to challenge the constitutionality of the release provisions and that because he acquiesced in the use of the insanity defense, he has waived his right to challenge the statute under which he was committed.

III.
STANDARD OF REVIEW

When an appeal is initially taken to the district court from a decision by a magistrate, any subsequent review by this Court will be conducted independent of, but with due regard for, the decision of the district court. *Smith v. Smith*, 124 Idaho 431, 436, 860 P.2d 634, 639 (1993) (citations omitted). We will uphold the magistrate's findings of fact if supported by substantial and competent evidence. *Id.* However, free review is exercised over the trial court's determination as to whether constitutional

requirements have been satisfied in light of the facts found. *State v. Weber*, 116 Idaho 449, 451-52, 776 P.2d 458, 460-61 (1989).

IV.

THE TERMS FOR RELEASE CONTAINED IN I.C. § 66-377(D) ARE UNCONSTITUTIONAL

Involuntary commitment is a severe curtailment of an individual's liberty interest. Accordingly, such a commitment must be accomplished in a manner consistent with constitutional due process requirements. *E.G., Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). Relying on *Foucha*, Gafford has invoked the due process protections of the Fourteenth Amendment to the United States Constitution.

In *Foucha*, the United States Supreme Court held that an insanity acquittee is entitled to release, as a matter of due process, when the original basis for acquittal and commitment no longer exists or the person is no longer dangerous. If the basis for acquittal is no longer present, that person must be released unless the State can demonstrate through other means, such as civil commitment proceedings, that the continued confinement is constitutionally proper. *Foucha* at ___, 112 S.Ct. at 1784-86. In reaching its holding, the Court struck down a Louisiana statute that allowed an insanity acquittee to be committed to a mental institution until he could demonstrate that he was not dangerous, even though the basis for his acquittal was no longer present.

In analyzing the application of *Foucha* to Idaho statutes, it should be noted that the statutes under which

Gafford was originally committed were substantially amended in 1982. There is no longer a provision for acquittal of a criminal defendant on the basis of mental illness, and any mental illness, if not sufficient to remove the necessary criminal intent, is now simply a factor to be considered in the sentencing process. *See I.C.* §§ 18-207, 19-2523; *State v. Card,* 121 Idaho 425, 430, 825 P.2d 1081, 1086 (1992). Thus, this opinion, and those in the companion cases of *Nielsen v. State* and *Henry v. State* issued in conjunction with this opinion, are of limited applicability and will affect only those criminal defendants currently committed in Idaho under the prior statutory scheme.

The Idaho release provision affecting Gafford is very similar to that at issue in *Foucha.* Former I.C. § 18-213 allowed for the acquittal of criminal defendants on the ground of mental illness. Upon acquittal, such persons were, pursuant to former I.C. § 18-214(1), automatically committed to the custody of the department of health and welfare to be placed in an appropriate mental health facility. Section 18-214(2) and (3) established the procedures for conditional release of insanity acquittees. Although these provisions have been repealed, I.C. § 66-337(d) incorporates former § 18-214 and provides that its release procedures shall remain in effect for every individual previously acquitted pursuant to § 18-213.

To gain release under § 66-337(d), the burden is placed upon the insanity acquittee to satisfy the committing court that he may be "discharged or released on condition without danger to himself or others." In other words, the statute allows the State to perpetuate the commitment of an insanity acquittee at a mental institution on the basis of dangerousness alone. It also places

the burden on the detainee to establish that he or she is no longer dangerous. Accordingly, we are constrained by the holding in *Foucha* to hold that I.C. § 66-337(d) violates due process and is therefore unconstitutional.

V.

RETROACTIVITY

The State contends that even if I.C. § 66-337(d) is unconstitutional per *Foucha*, that decision represents a new rule of constitutional law that should not be retroactively applied to upset a final judgment upon which the State in good faith has relied. The magistrate determined that the State's contentions were unfounded, apparently because Gafford does not seek to disturb the judgment which resulted in his acquittal and commitment. The district court reversed the magistrate, holding that *Foucha* does not apply retroactively.

A fundamental policy underlying the general ban on the retroactive application of new constitutional rules is the fear of upsetting final judgments entered in good faith reliance on an old rule. This policy is obviously strong where a person attacks, in collateral proceedings, the validity of a prior judgment on the basis of a new rule. *see, e.g., Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). In this case, however, Gafford does not contend that his confinement is illegal because of any deficiency in a prior judgment, but because the State perpetuates his confinement in violation of the Due Process Clause of the Fourteenth Amendment. Thus, Gafford does not seek to have the holding in *Foucha* applied retroactively; he seeks the prospective

application of that rule to his present and continued confinement. Accordingly, the retroactivity rules cited by the State and relied upon by the district court have no application in this case.

Even if the application of *Foucha* to this case did present a retroactivity problem, it would nonetheless apply to the terms of Gafford's present confinement. A new rule will be applied on collateral review if it requires the observance of procedures "implicit in the concept of ordered liberty."[1] *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (quoting *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion)). *Foucha* announced a rule grounded in due process and formulated to protect a fundamental liberty interest. *See, e.g., State v. Chilton*, 112 Idaho 823, 828, 736 P.2d 1277, 1282 (1987) (involuntary commitment to a psychiatric facility is a "uniquely strong deprivation of liberty") (citations omitted). As such, it is a rule that requires observance of procedures "implicit in the concept of ordered liberty." Thus, even if Gafford did seek retroactive application of *Foucha*, that decision would unquestionably apply to his case.

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[1] A "new rule" is one not dictated by precedent existing at the time a judgment became final. *Butler v. McKellar*, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990). A case will be deemed to have announced a "new rule" if its outcome "was susceptible to debate among reasonable minds." *Id.* at 415, 110 S.Ct. at 1217. Because *Foucha* relies on precedent concerning civil commitment, *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), or that arguably presents an interpretation of statutory law of the District of Columbia, *Jones v. United States*, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983), its holding represents a "new rule" of constitutional law.

VI.
COLLATERAL ESTOPPEL (ISSUE PRECLUSION)

The State contends that even if *Foucha* applies, the judgment of acquittal entered in 1981 has given rise to an "estoppel by judgment" which precludes the re-litigation of Gafford's mental state. This contention is without merit.

To determine whether collateral estoppel (issue preclusion) applies we ask: (1) whether the party against whom the prior decision is asserted had a full and fair opportunity to litigate the issue in the earlier case; (2) whether the issue decided in the prior case was identical to the one presented in the subsequent litigation; (3) whether the issue was actually decided in the prior litigation; (4) whether there was a final judgment on the merits; and (5) whether the party against whom the plea is asserted was a party or privy of a party to the prior adjudication. *Anderson v. City of Pocatello,* 112 Idaho 176, 183-84, 731 P.2d 171, 178-79 (1986).

In this case, there is no identity between the issue adjudicated in the acquittal proceedings and the issue raised by Gafford here. The judgment of acquittal determined that *at the time he committed certain criminal acts,* Gafford was suffering from a mental disease or defect that relieved him of criminal responsibility for those acts. *See* former I.C. § 18-213. However, it is undisputed that Gafford's mental condition has changed since his acquittal in 1981. Gafford's mental state *in 1995* was not and could not be determined by the judgment of acquittal. Thus, we hold that the doctrine of collateral estoppel has no application in this case.

VII.

ESTOPPEL AND WAIVER

The State also contends that the equitable doctrines of estoppel and waiver prevent Gafford from asserting his claim for release from confinement.

A. Equitable Estoppel

The doctrine of estoppel is grounded on the notion that it would be inequitable to allow a person to induce reliance by taking a certain position and, thereafter, take an inconsistent position when it becomes advantageous to do so. *E.g., Davis v. Wakelee,* 156 U.S. 680, 15 S. Ct. 555, 39 L. Ed. 578 (1895). The doctrine as applied in Idaho also requires that the person against whom it is invoked take inconsistent positions. *See, e.g., Evans v. Idaho State Tax Comm'n,* 97 Idaho 148, 540 P.2d 810 (1975).

In this case, Gafford has not taken inconsistent positions. His contention in the present case is that he is not currently mentally ill, a fact about which there is no dispute. This position is in no way inconsistent with his prior assertion that he was mentally ill. Although Gafford's prior assertion resulted in an acquittal fourteen years ago, it is hardly inconceivable that a person's mental condition might improve over that span of years. Accordingly, we hold that the doctrine of estoppel is not implicated on the facts of this case.

B. Acquiescence and Waiver

The State, relying on *State v. Hightower*, 101 Idaho 749, 620 P.2d 783 (1980), argues that by failing to challenge the validity of the statutes under which he was acquitted at the time he was acquitted, Gafford has acquiesced in his continued confinement and has waived the right to now challenge the validity of those statutes.

In *Hightower*, we stated that:

> In general, waiver of a constitutional right or the right to challenge the constitutionality of a statute may be effected, or estoppel created, by deliberate election, by conduct inconsistent with the assertion or exercise of the right, as by any course of conduct which shows an intention to waive any question as to the validity of the statute, or by conduct rendering it unjust to permit the assertion of such a constitutional provision.

Id. at 757, 620 P.2d at 791 (quoting 16 C.J.S. *Constitutional Law* § 89(b) (1956)). The rationale for this rule is that if a party has doubts about the constitutionality of a statute, it should mount an appropriate challenge to the provision at the original hearing, before a judgment of acquittal is entered. *Id.* We conclude that the *Hightower* rule and its rationale have no bearing in this case.

The State's argument overlooks the fact that two distinct statutes are involved, one relating to Gafford's initial acquittal (former I.C. § 18-213) and the other relating to his continued commitment (former I.C. § 18-214). As the district court recognized, Gafford could not, in the acquittal proceedings, "be expected to bring a claim that the *release* provisions were unconstitutional." (emphasis

added). Raising such a claim in the absence of a concrete dispute relating to the release provisions would be a futile act since it would constitute a request for an advisory opinion which would be denied by the courts of this state. *See Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989) (referring to the various categories of non-justiciable cases). Therefore, we hold that Gafford has not waived his right to challenge I.C. § 66-337(d).

VIII.

CONCLUSION

We are compelled by the United States Supreme Court's holding in *Foucha v. Louisiana*, 504 U.S. ___, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992), to hold that as applied to Gafford's continued confinement, I.C. § 66-337(d) effects a denial of due process under the 14th Amendment to the United States Constitution. Thus, based solely on an application of *Foucha*, we hold that Gafford is entitled to immediate release. The magistrate's decision is therefore affirmed.

Chief Justice McDEVITT, Justices JOHNSON, SILAK and SCHROEDER, **CONCUR.**

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE APPLICATION OF: STEVEN GAFFORD FOR A WRIT OF HABEAS CORPUS	ORDER DENYING PETITION FOR REHEARING NO. 21472
STEVEN GAFFORD, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	Ref. No. 95RH-35

The Respondent having filed a PETITION FOR REHEARING on September 5, 1995 and supporting BRIEF on September 29, 1995 of the Court's Opinion released August 16, 1995; therefore, after due consideration.

IT IS HEREBY ORDERED that Respondent's PETITION FOR REHEARING be, and hereby is DENIED.

DATED this 17th day of October, 1995.

By Order of the Supreme Court

/s/ Lois Dawson
Lois Dawson,
Chief Deputy Clerk for
Frederick C. Lyon, Clerk

[SEAL]
cc: Counsel of Record
District Court Clerk
District Judge James C. Herndon